

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1359

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**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS MORALES,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Southern District of New York*

APPELLANT'S BRIEF

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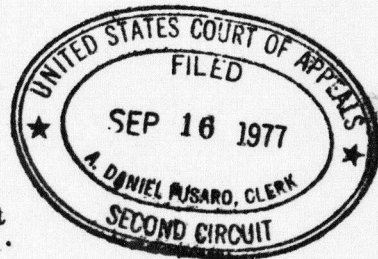


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

lee,

- against -

LOUIS MORALES,

Defendant-Appellant.

PRELIMINARY STATEMENT

The appellant appeals from a judgment entered August 24, 1977 whereby the appellant was convicted of criminal contempt under the one count of the indictment, predicated on 18 U.S.C. 401 (3). (2A, 162A, 163A, 171A).*

The case was tried in the United States District Court, Southern District of New York, before Court and jury, the Honorable Charles E. Stewart presiding.

As a consequence of the conviction, the appellant was sentenced to a jail term of six (6) months (184A).

*This refers to the pagination of the appendix furnished by appellant.

**THE QUESTIONS AND ISSUES
PRESENTED FOR REVIEW:**

A. Was it proper for the prosecution to bring this case on by indictment, or should this action have been instituted under Rule 42 of the Federal Rules of Criminal Procedure?

B. Was it proper to indict the appellant for criminal contempt as aforesaid, after the appellant had already been cited and committed for a civil contempt, 28 U.S.C. 1826?

C. Should the Court below have allowed the appellant to establish as a defense illegal electronic surveillance and was it proper to deny a motion for a disclosure of all the warrants and affidavits underlying the same, authorizing such electronic surveillance?

D. Was the appellant's right to a fair trial prejudiced by counsel who did not object to certain evidence being introduced in evidence, until after the same was introduced, or put another way, was trial counsel ineffective?

THE FACTS:

INTRODUCTION

Prior to trial, the appellant moved to dismiss the indictment on the ground that it was improper for the prosecution to institute the action by means of a grand jury indictment. This was a formal motion and the appellant argued that he was already cited for civil contempt (Judge Lloyd McMahon), when he appeared with counsel at such stage, before Judge McMahon. At that phase, the appellant made known to Judge McMahon, with counsel present, upon being questioned that he would not go before the relevant grand jury and respond to questioning by the prosecutor.

This was before the indictment was rendered herein. At still an earlier appearance before the grand jury, the appellant represented by counsel raised the issue of electronic surveillance. The matter was brought before Judge Lasker, who conducted a brief hearing, examined the warrants authorizing electronic surveillance in camera, and subsequently ruled that those warrants were facially valid (5A, 7A).

The motion to dismiss having been denied, prior to trial, the action proceeded before trial before the Court and jury.

THE GOVERNMENT'S CASE
AGAINST THE APPELLANT

The trial itself was brief. The evidence consisted of the proceedings before Judge McMahon (88A, 89A, 90A).

During the trial, as part of its proof as aforesaid, the government without objection being initially made, introduced the proof that the appellant appeared before Judge McMahon with counsel, and that he made known to Judge McMahon upon being questioned that he would not go back to the grand jury and respond to any interrogation. Of course the appellant was ordered to do that by Judge McMahon, he refused and he was then cited for civil contempt (95A, 96A, 101A, 102A).

Ultimately, counsel then moved for a mistrial because he did not make a timely objection to the transcript of the proceeding when the appellant was cited for civil contempt and did not properly represent the appellant when he was before Judge McMahon at the hearing to commit the appellant for civil contempt (113A, 124A-126A).

POINT I

THE APPELLANT SHOULD NOT HAVE BEEN
INDICTED FOR CRIMINAL CONTEMPT.

Rule 42 of the Federal Rules of Criminal Procedure, contains two subdivisions. The rule deals with "criminal contempt".

In this case and prior to trial, two judges heard the issues that were raised by the appellant prior to his grand jury appearance. Both judges directed the appellant to appear before the grand jury and respond to interrogation. The appellant was advised he would be held for civil contempt and ultimately was. However that committment was of short duration. Not one of the judges involved in the pre-indictment proceedings ever asked the prosecutor to initiate a proceeding under Rule 42 of the Federal Rules of Criminal Procedure nor did the Court itself in those stages initiate a proceeding to hold the appellant for criminal contempt.

One inference that flows from the facts in this case was that the prosecutor, not the Judge, felt that the civil committment the appellant underwent was too mild. That the jailing of the appellant was too brief for the prosecutor's sense of proper punishment for refusing to respond before the grand jury. To view the matter in its stark reality,

according to the prosecution the appellant was not punished sufficiently by the "civil" commitment.

In Re Grand Jury Subpoena "Custodian of Records, Amalgamated Meat Cutters and Butcher Workmen of North America, etc.," 402 F. Supp. 725 (D.C.E.D. Wisc., 1975) it was held that no indictment lies under 18 U.S.C. 401 and that usually a grand jury cannot indict one under that statute. In that case the contemnors were under a labor injunction and apparently violated the injunction. The judge who granted the injunction was applied to by a federal agency to cite the individuals for criminal contempt and the judge directed the issue to be referred to a grand jury (402 F. Supp. at page 727). The grand jury then issued subpoenas for documents and commenced an investigation. A motion was made to vacate the subpoenas and it was held on page 734 that the grand jury was without jurisdiction. It was among other things stated that the issue was whether a grand jury can indict one for criminal contempt or render a presentment. A presentment was defined in that case as a written notice made by the grand jury as to an offense that the grand jury knew about or observed. That when criminal contempt actions were instituted by "presentment" the conduct alleged actually occurred in the presence of the grand jury.

Then on pages 735-736 it was held that criminal contempt is a singular concept which evolved to "vindicate the authority of the Court and the integrities of its proceedings." It was further recognized that under Rule 42B of the Federal Rules of Criminal Procedure, a criminal contempt proceeding can be instituted because it is the Court which is offended and not the grand jury. That the Court on its own institutes the proceeding.

In the Court below and as part of the opposition to the motion to dismiss, the government relied on Steinert v. U.S.D.C., etc., 543 F. 2d 69 (Cir. 9th, 1976). Footnote number 1 at pages 71 of that opinion manifested the disapproval of the 9th Circuit of the holding in Re Amalgamated Meat Cutters, supra. It is submitted that that case is not binding in this Circuit. Furthermore, it has to be noted that the disapproval of In Re Amalgamated Meat Cutters is shown in a mere footnote without any extended opinion.

In Shillatani v. U.S., 384 U.S. 364 (1966) it was stated at pages 371-372, footnote 9 that:

"This doctrine further requires that the trial judge first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determined, for good reason, that the civil remedy would be inappropriate."

It is respectfully submitted that the contrary is what occurred here. The prosecutor apparently felt that the civil remedy was "inappropriate".

By contrast, see U.S. v. DeSimone, 267 F. 2d 741, (Cir. 2d, 1959). In that case, the practice was to charge the appellant with criminal contempt by way of a grand jury presentment. The defendant there argued that an indictment should have been had. The balance of the opinion dealt with this argument as being the basis for a trial jury. This Court then stated at pages 743 that a criminal "contempt" was not to be considered a crime in the constitutional sense and was governed by Rule 42 of the Federal Rules of Criminal Procedure. This is precisely what was held in the case of In Re Amalgamated Meat Cutters and Butcher Workmen, 402 F. Supp. 725, supra.

In opposing the motion the government also relied in the Court below on U.S. v. Eichorst, 544 F. 2d 1383 (Cir. 7th). The government here argued that Eichorst overruled In Re Amalgamated Meat Cutters and Butcher Workmen. A reading of that case discloses that the issue was the sufficiency of an indictment charging the appellant there with contempt, the dispute arising from whether proper notice was given to

the defendant or whether the indictment was sufficient. No such claim was made in this very case. In footnote 4 of Eichorst, on page 1388 of 544 F. 2d it was stated:

"Since appellants here do not object to the use of the grand jury, and in fact appear to have been involved in requesting it,...".

While the prosecution's choice to charge one with a crime is the prerogative of the prosecution or as a matter of discretion with the prosecution, it is suggested that if this choice is a discretionary one, the prosecution exercised its discretion without any accountability, that is arbitrarily. See The American Criminal Law Review, Volume 13, No. 3, Winter 1976, at pages 473-481.

Furthermore, it is claimed that the very grand jury that was investigating the matters that prompted calling the appellant, also rendered the indictment herein. See U.S. v. Hinton, 543 F. 2d 1002 (Cir. 2d, 1976) at page 1010. This Court stated there that:

"We believe that as a matter of fundamental fairness, a government practice of using the same grand jury that heard the immunized testimony of the witness to indict him after he testifies, charging him with criminal participation in the matters being studied by the grand jury, cannot be countenanced. The procedure is so fraught with applicable constitutional problems and with the potential for abuse that in our supervisory power over the administration of criminal justice in the District Courts of this Circuit..., we

are compelled to conclude that the procedure the Government adopted here falls outside the bounds of permissible prosecutorial conduct..."

See also, The American Criminal Law Review, Volume 10, No. 4, Summer 1972 "The Grand Jury", at pages 701-703.

Furthermore, there is an issue that was raised below and is now raised here as to either double jeopardy or collateral estoppel under the 5th Amendment to the Federal Constitution or an outright violation of the due process of law under the 5th Amendment to the Federal Constitution. From the aspect of double jeopardy or collateral estoppel, or due process, it is respectfully suggested that the appellant was placed in all three categories. It is recognized that a commitment for civil contempt does not involve a "crime". But jail is jail, and from the vantage of a civil contemnor, he is being punished by being committed. Commitment has all the earmarks of a criminal action. That is, he is entitled to notice, he is entitled to the right to counsel and then as a consequence of being held in contempt he goes to jail. In other words, if one looks at the substance of a commitment for civil contempt, all indicia of a criminal action are found. As was held in Person v. Association of the Bar of the City of New York, Court of Appeals, Second Circuit, April 29, 1977, slip opinion

3261, at page 3266:

"State disciplinary and disbarment proceedings have been held comparable to criminal proceedings..."

See also Erdman v. Stevens, 458 F. 2d 1205 (Cir., 2d, 1972), cert. denied, 409 U.S. 889, also holding that a state disbarment is quasi criminal. It is submitted that if the loss of a license to earn a livelihood is considered quasi criminal, certainly a civil contempt proceeding followed by a jail term is "quasi criminal".

Furthermore, the government could have had the issue of civil and criminal contempt decided before the two judges that the appellant appeared before. The two types of contempt could have been consolidated in one proceeding. See Ashe v. Swenson, 397 U.S. 436, concurring opinion of Mr. Justice Brennan.

The appellant is therefore also being punished twice. He was punished in the civil contempt proceeding because he went to jail. He did not choose to cut the jail term short by volunteering to testify. The option was his and he exercised it, he stayed in jail which is the purpose of a civil committment. But he was nevertheless punished. And the single refusal before the two other judges triggered both types of contempts. From the point of view of double punishment, the appellant was placed in double jeopardy. See U.S. v. Sperling, U.S. Court of Appeals, 2nd Circuit, June 13, 1977, slip opinion 4139 at page 4142 and Jeffers v. U.S., 45 U.S.

Law Week, 4691. In Brown v. Ohio, 45 U.S.Law Week, 4697, the Supreme Court held favorably for the petitioner where the issue of double jeopardy was presented. It was stated at page 4698 in part that:

"...The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishment; but once the legislature has acted Courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial."

This single refusal by the appellant to testify before the grand jury if such is the basis for this action, may have violated two statutes, the one governing civil contempt and the one governing criminal contempt, 18 U.S.C. 401 or more probably Rule 42 of the Federal Rules of Criminal Procedure.

POINT II:

THE COURT BELOW SHOULD HAVE GRANTED A PRE-TRIAL MOTION FOR DISCLOSURE OF ANY ELECTRONIC SURVEILLANCE WARRANTS AND THE UNDERLYING PAPERS THEREFOR SO THAT THE APPELLANT COULD HAVE ASCERTAINED WHETHER HE HAD A DEFENSE TO THE CHARGE OF CRIMINAL CONTEMPT BASED ON ILLEGAL ELECTRONIC SURVEILLANCE.

The appellant promptly moved in the Court below also for a disclosure of any electronic surveillance warrants and the grounds underlying the same. That motion was denied.

There seems to be little question in this case that the appellant was subjected to electronic surveillance. On a prior occasion Judge Lasker examined the electronic surveillance orders, in camera, as mandated in the cases of In Re Millow, 529 F. 2d 770 (Cir. 2d, 1976) and Re Persico, 491 F. 2d 1156 (Cir. 2d, 1974). See also Re Puscaglia, 518 F. 2d 77 (Cir. 2d, 1975). However that was when the grand jury was conducting this investigation and the rationale of those cases was that a witness was not entitled to a suppression hearing because the grand jury proceedings could be delayed. Furthermore, those cases do not arise in the context of a criminal action for contempt.

Appellant relies on Gelbard v. U.S., 408 U.S. 41 (1972). That case clearly held that a defense to a contempt proceeding or action can be based on illegal electronic

surveillance. The Court in Gelbard assumed there was electronic surveillance. Here the appellant was denied the necessary disclosure so that a defense could be raised. The concurring opinion in that case of Mr. Justice White at page 69 of 408 U.S. held that the government in producing a court order may comply with the ruling of the majority in Gelbard but that a witness would not be entitled to a "full-blown suppression hearing".

However in this case the issue is raised in regard to a criminal action for criminal contempt. There is no issue that the grand jury would be delayed in its investigation. The appellant when he made this motion was already charged with a crime, criminal contempt.

The claim of the government in the Court below that Judge Lasker already ruled is not relevant to the defense of this action. Firstly, there was no criminal contempt action. Secondly, at that hearing, the appellant was not shown the warrants nor the affidavits submitted to procure the warrants and was therefore prevented from arguing that the warrants were not "facially" sufficient.

Furthermore, the facial sufficiency of a warrant is not the sole standard. See 18 U.S.C. 2518(10)(a).

Thus the issues of probable cause, the proper sealing of the products of the electronic surveillance to insure authenticity of the tapes and also whether the proper government official authorized the application for electronic surveillance, applies.

In Alderman v. U.S., 394 U.S. 165 (1969) at page 181-182 it was held that the issue of electronic surveillance should not first be submitted to the judge who is to examine these issues "in camera".

If this were the ordinary criminal case or even a perjury case, there is no question that the defendant would have the right to go into the issue of electronic surveillance, provided he established standing and the like. However because this was a contempt case where there is no statutory limit as to imprisonment that a defendant could face, the appellant was deprived of this right. The government's argument in the Court below that the questions propounded to the appellant were not based on electronic surveillance is devoid of any meaning where counsel for the defendant was not given the opportunity to contest the claim. See also U.S. v. Ceccolini, 542 F. 2d 136 (Cir., 2d, 1976). Certiorari was granted in that case by the United States Supreme Court, No. 76-1151, May 2, 1977.

In People v. Mulligan, 40 A.D. 2d 165, 338 N.Y.S. 2d 488, at pages 491-492 it was stated in part that:

"...A Grand Jury witness..., cannot move to suppress evidence in that proceeding should not be required to speculate as to the source of the questions propounded nor to anticipate a criminal contempt indictment. On the contrary, he is entitled to await the formal accusation and service of the required notice before moving for appropriate relief. It is only then that an inquiry can be appropriately made as to whether or not the questions asked by the grand jury were based on the information acquired as a result of an improperly issued electronic surveillance order. And if there were, then this defendant cannot be convicted for his refusal to answer any legal and proper interrogatory..." (Omitting internal citations).

Furthermore, the appellant was entitled to full disclosure as a matter of due process. See Matthews v. Eldridge, 424 U.S. 319 (1976) at pages 332, 334. See also Volume XXIX, University of Miami Law Review, 334 et seq., (1975) at pages 362-366.

Finally, reliance is placed on 18 U.S.C. 2518 (9).

POINT III:

APPELLANT DID NOT HAVE THE ASSISTANCE
OF EFFECTIVE COUNSEL.

Firstly, counsel should have initially objected to the introduction of evidence relating to the appellant's appearance before Judge McMahon. The questioning by Judge McMahon was ascertain whether the appellant knew what he was inviting by his refusal to comply with the direction to go before the grand jury and respond to interrogation. At the very least the hearing before Judge McMahon was not to establish a foundation for a criminal contempt prosecution.

The purpose of the evidence introduced by the prosecutor was to show that the appellant had the requisite intent or was willful in his refusal to comply either with Judge McMahon's order, Judge Lasker's order, or refusing to testify when he was before the grand jury. Belatedly, counsel raised the issue at trial. The Court could have struck the evidence and the jury would not have had that evidence before it when it had to deliberate, although it may have had it before it before the objection was made. However, counsel did not make a timely objection, and consequently but belatedly raised the issue.

Next, former counsel appeared with the appellant before Judge McMahon. Apparently he never objected to Judge McMahon's questioning the appellant nor did he advise the appellant not to respond to Judge McMahon. This constituted the very commission of the crime of criminal contempt. Namely, the appellant's responses to Judge McMahon's questioning and also to Judge McMahon informing the appellant what the proceeding was about. Consequently it is submitted that the appellant did not have effective counsel when he appeared before Judge McMahon.

It is submitted that the standard for the Circuit that counsel will be deemed ineffective if his representation was a farce and a mockery. It is submitted that trial counsel did not effectively represent the appellant. Since this evidence spelled out the subjective factor required to convict the appellant for a willful or contemptuous refusal to answer, there is nothing for the appellant to bring before the jury. The case was in effect already decided before the appellant was indicted.

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD
BE REVERSED.

Respectfully submitted,

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FRANKEL US v. Morales

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

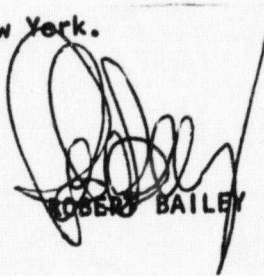
ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 14 day of Sept. 1977 deponent served the within Brief upon

U.S. Atty. So. Dist. pf NY

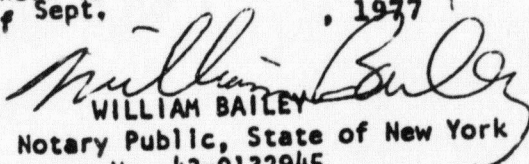
attorney(s) for Appellee

in this action, at 1 St. Andrews Pl., NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 14 day
of Sept. , 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

